IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION, *Appellant,* vs. THE RAILROAD CREDIT CORPORATION, *Appellee.*	No. 10,966 (CONSOLIDATED CASES)
THE WESTERN PACIFIC RAILROAD CORPORATION (a corporation), *Appellant,* vs. THE RAILROAD CREDIT CORPORATION (a corporation), *Appellee.*	No. 10,962

OPENING BRIEF OF APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION.

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STATEMENT OF THE JURISDICTIONAL FACTS.

The appeals herein presented by The Western Pacific Railroad Corporation are from two orders of the District Court of the United States, for the Northern District of California, Southern Division. Both orders and both appeals deal with the same subject matter, and involve the right claimed by The

Western Pacific Railroad Corporation to recover from The Railroad Credit Corporation certain accommodation collateral (or cash received thereon) furnished by the appellant as partial security for certain notes given by The Western Pacific Railroad Company, debtor, to The Railroad Credit Corporation.

1. One appeal, No. 10966, is from an order of the District Court entered June 20, 1944 (R. 10966, p. 12), and from a Judgment of the District Court entered August 7, 1944 (R. 10966, p. 16), which dismissed a bill of complaint filed on May 22, 1944 (R. 10966, p. 2), by The Western Pacific Railroad Corporation against The Railroad Credit Corporation to recover certain accommodation collateral (or cash received thereon), furnished directly by The Western Pacific Railroad Corporation as partial security for certain promissory notes given by The Western Pacific Railroad Company, debtor, to The Railroad Credit Corporation.

Notice of appeal from said order and Judgment was filed by appellant on September 18, 1944 (R. 10966, p. 17). On November 18, 1944, appellant filed its statement of points on which it intended to rely on its appeal. (R. 10966, p. 26.)

2. The other appeal, No. 10962, is from an order made by the District Court on September 14, 1944, in action No. 26591-S (R. 10962, p. 143), which was the original proceeding for the reorganization of The Western Pacific Railroad Company heretofore before this court in *In re The Western Pacific Railroad Com-*

pany, 9714, 124 Fed. (2d) 136, and before the Supreme Court of the United States, 318 U. S. 449.

On May 2, 1944, a petition was filed in the District Court by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee of The Western Pacific Railroad Company, debtor, for an order of said District Court construing said Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein. (R. 10962, pp. 69-96.) A hearing upon this petition was held on June 2, 1944, in the District Court. (R. 10962, p. 109.) On June 21, 1944, said Court made and filed a Corrected Memorandum Opinion and Order Construing Plan of Reorganization. (R. 10962, p. 98.) On September 14, 1944, the District Court made the order from which appeal is taken by The Western Pacific Railroad Corporation, an Order Construing Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein. (R. 10962, p. 143.)

Notice of Appeal from said order was filed by this appellant with the Clerk of the District Court on October 13, 1944. (R. 10962, p. 150.) On November 18, 1944, appellant filed with the Clerk of the District Court its Statement of Points upon which it intended to rely on its appeal. (R. 10962, p. 175.)

The Railroad Credit Corporation has likewise appealed from certain portions of the Order of the District Court, entered September 14, 1944, in the reorganization proceeding.

On November 28, 1944, The Railroad Credit Corporation and The Western Pacific Railroad Corporation filed with this Court a Stipulation for an order to shorten the records on appeal and to consolidate the three appeals for briefing, for oral argument and for use of the record. (R. 10962, p. 185.) An order so providing was entered November 29, 1944. (R. 10962, p. 189.)

STATEMENT OF CASE AND QUESTIONS INVOLVED.

At the outset a word of explanation of the double appeals by The Western Pacific Railroad Corporation, and the separate appeal by The Railroad Credit Corporation should be helpful to this Court.

On or about March 25, 1933, The Western Pacific Railroad Corporation pledged and assigned to The Railroad Credit Corporation certain accommodation collateral as partial security for money loaned by the Credit Corporation to The Western Pacific Railroad Company, the carrier. This accommodation collateral included certain indebtedness due The Western Pacific Railroad Corporation from:

(1) The Standard Realty and Development Company in the sum of $120,000, for advances made to that company;

(2) Sacramento Northern Railway in the sum of $856,250, for advances to said Railway. (R. 10962, p. 52.)

In the original proceeding for the reorganization of the carrier, The Western Pacific Railroad Com-

pany, the question was raised by various parties as to the status of accommodation collateral pledged by persons other than the debtor as security for notes of the debtor held by The Railroad Credit Corporation. No provision with regard to such collateral was included in the Plan of Reorganization.

In dealing with this question, the Supreme Court of the United States, in the opinion written by Mr. Justice Reed, said:

> "None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and The Western Pacific Railroad Corporation perhaps had unsecured claims against the debtor for their securities and other collateral which the debtor had borrowed, but these were held worthless as claims against the debtor. 233 I.C.C. 452. This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the commission."

And further:

> "The A. C. James Company's unsecured claim against the debtor for the loan of the bonds is valueless, 233 I.C.C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor." 318 U. S. 506.

The clear implication of what is here said, appellant believes and contends, is that the conflicting claims of the pledgors and pledgees of property which does not belong to the debtor is outside the jurisdic-

tion of the Bankruptcy Court in a proceeding under Section 77; that no attempt was made to deal with this controversy in the Plan of Reorganization, and that in order to settle such a controversy resort must be had to an independent proceeding in a court of general jurisdiction.

On May 9, 1944, the Reorganization Committee filed in the District Court in this proceeding, No. 26591-S, a Petition entitled "Petition of Reorganization Committee for an Order Construing Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein" in which they invoke Subdivision V of the plan of reorganization authorizing the court to construe the Plan; and pursuant to this authority asked that the District Court adjudicate the conflicting claims of The Western Pacific Railroad Corporation and The Railroad Credit Corporation to the accommodation collateral referred to in the opinion of the Supreme Court. (R. 10962, p. 69.)

The appellant believes and contends that the District Court was, and is, without power and jurisdiction to adjudicate the issue in the bankruptcy proceeding for the following reasons:

(a) The Supreme Court has so held;

(b) The accommodation collateral was not the property of the debtor, was not dealt with in the Plan, and the District Court may not construe the Plan *as to matters not embraced therein;*

(c) The District Court, in construing the Plan pursuant to Subdivision V of the Plan, acts as an arbitrator, not as a Judge, and his determi-

nation as to a matter within the scope of the arbitration (which this controversy is not) is final and conclusive as to all parties to the Plan (which The Western Pacific Railroad Corporation is not). Or to state the same proposition in somewhat different language: All parties who are participating in the reorganization have accepted Article V, and have thereby agreed not to appeal from the determination of the District Court.

For these reasons, among others, The Western Pacific Railroad Corporation, as owner of the accommodation collateral now in controversy brought an appropriate suit against The Railroad Credit Corporation in the same District Court in which the bankruptcy proceeding was pending. (R. 10966, p. 2.) In this bill, this appellant asked:

"1. That the accommodation collateral hereinabove described be adjudged and decreed to have been exonerated, released and discharged as security for the note or notes of The Western Pacific Railroad Company held by the defendant, The Railroad Credit Corporation;

"2. That the defendant, The Railroad Credit Corporation, be directed and decreed to surrender to the plaintiff for cancellation the instrument of assignment or pledge dated March 25, 1933, hereinabove described;

"3. That the defendant, The Railroad Credit Corporation, be decreed to refund and repay to plaintiff all moneys turned over to the defendant by the plaintiff since January 1, 1939, representing amounts paid by The Standard Realty and Development Company on account of advances made to it by the plaintiff and assigned by the

plaintiff to the defendant by the instrument of assignment or pledge dated March 25, 1933, hereinabove described."

The learned District Court, seeming to be of the opinion that the Court was free to determine the controversy in either of the two proceedings, chose to decide it in the bankruptcy proceeding rather than in the separate suit, and on June 19, 1944, entered the Order dismissing the independent suit, reciting that:

"It appears to the court that the subject matter of this suit is closely connected with and a part of the said reorganization proceedings, and that the issues contained herein are set forth in the 'Petition of Reorganization Committee for an Order Construing Plan of Reorganization' etc., dated May 9, 1944, now pending before the court, and should be determined in that proceeding. It is therefore

ORDERED:

The motion to dismiss is granted."

Thereafter, on August 7, 1944, a judgment for dismissal of the bill filed by this appellant was entered, on motion of The Railroad Credit Corporation. (R. 10966, p. 16.)

In the appeals herein presented, appellant respectfully urges, first, that the District Court did not possess the freedom of selection which, the record shows, was exercised and that he should have decided the issue in the independent action. Appellant will therefore ask that this court reverse the Order of the

District Court made on June 20, 1944, and the Judgment of the District Court entered August 7, 1944, which dismissed the independent Bill of Complaint, for the reason (a) that appellant's independent bill does state a cause of action against The Western Pacific Railroad Corporation for the relief prayed for, and (b) that the subject matter of the suit was not properly embraced in the "Petition of the Reorganization Committee dated May 9, 1944".

But The Western Pacific Railroad Corporation wants the basic question at issue in these appeals decided: namely, whether by reason of the provisions in the Plan of Reorganization of The Western Pacific Railroad Company, as approved by the Supreme Court, this appellant is not now entitled to have returned to it as exonerated the accommodation collateral furnished by appellant to The Railroad Credit Corporation, together with all moneys paid since January 1, 1939, by The Standard Realty and Development Company on account of its indebtedness to appellant, assigned by appellant to The Railroad Credit Corporation.

Accordingly in its appeal No. 10962, appellant will ask this Court to reverse the Order of the District Court of September 14, 1944, insofar as that Order deals with the respective rights and interests of The Western Pacific Railroad Corporation and The Railroad Credit Corporation in the accommodation collateral above referred to, for the reason, (a) that said Order purports to deal with matters not embraced in the Plan of Reorganization and hence *ultra*

vires of the court under Article V of the Plan of Reorganization, and (b) for the reason that the new securities allocated to The Railroad Credit Corporation under the Plan, in payment of its claim against the debtor, were to be taken at the values fixed by and in the Plan; that such securities, under the terms of the Plan, were to be issued in full satisfaction of its claim, and that thereby the accommodation collateral furnished and pledged by this appellant was exonerated and should be returned to appellant, together with any moneys paid by The Standard Realty and Development Company on account of its indebtedness to The Western Pacific Railroad Corporation, assigned by the instrument of March 25, 1933.

SPECIFICATIONS OF ERRORS RELIED UPON.

Appeal No. 10,966.

"1. That the District Court was in error in making its Order of June 19, 1944, dismissing said action on the ground that the subject matter thereof was connected with and a part of a proceding, 'In the Matter of The Western Pacific Railroad Company, Debtor', No. 26591-S, then pending before said District Court, and that the issues contained in the above entitled action were among the issues set forth in said action No. 26591-S in a 'Petition of Reorganization Committee for an Order Construing Plan of Reorganization', and that said issues should be determined in said Reorganization proceeding.

The issues presented in the above entitled action concerned the disposition of certain collateral as-

signed on March 25, 1933 by The Western Pacific Railroad Corporation to The Railroad Credit Corporation, as further security for certain loans or advances made by said Credit Corporation to The Western Pacific Railroad Company. This collateral consisted of claims of The Western Pacific Railroad Corporation against The Standard Realty and Development Company, and against Sacramento Northern Railroad for money advanced each of said companies. They were not the property of the debtor, the Railway Company. They were not a part of, nor in any manner disposed of or affected by the Plan of Reorganization of The Western Pacific Railroad Company.

The rights of The Western Pacific Railroad Corporation, as assignor and of The Railroad Credit Corporation, as assignee, of said collateral were not properly determinable in the bankruptcy action. The petition in said action, then before said Court, in said Reorganization Proceeding was for an interpretation and construction of the Plan, of which said rights in said collateral were in no way a part. The District Court erred in declining to take jurisdiction of the issue raised under the above entitled action, No. 23307-S and in granting defendant's motion to dismiss.

2. For the same reasons, the Court was in error in its Judgment, rendered and filed in the above entitled matter on August 7, 1944."

Appeal No. 10,962.

"1. That the District Court erred in that portion of the Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (c) of the Findings

and Conclusions upon which said Order is based) in holding that the rights of The Railroad Credit Corporation under its pledge agreement with The Western Pacific Railroad Corporation will not be affected by the issuance of the new securities to The Railroad Credit Corporation.

2. That the District Court erred in that portion of its Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (c) of the Findings and Conclusions upon which said Order is based) in holding that The Railroad Credit Corporation is entitled to proceed against the collateral pledged, under its pledge agreement with The Western Pacific Railroad Corporation dated March 25, 1933, to the extent that the actual or market value of the new securities to be issued to The Railroad Credit Corporation shall not satisfy its claim.

3. That the District Court erred in said Order of September 14, 1944, appealed from by The Western Pacific Railroad Corporation (and particularly paragraph (5) of said Order) in adjudging and decreeing that The Railroad Credit Corporation is entitled to retain the claims against Standard Realty and Development Company and Sacramento Northern Railway pledged to and with The Railroad Credit Corporation by The Western Pacific Railroad Corporation by an instrument dated March 5, 1933, and to apply the proceeds thereof in satisfaction of its claim against the debtor.

4. That no provision was made in the Plan of Reorganization as certified by the Interstate Commerce Commission and as affirmed by the Su-

preme Court of the United States, affecting the collateral assigned on March 5, 1933 by The Western Pacific Railroad Corporation. The claims against The Standard Realty and Development Company, and Sacramento Northern Railway were the property of The Western Pacific Railroad Corporation. They were not loaned to the debtor, The Western Pacific Railroad Company. They at no time constituted any part of the assets of the debtor. It was not within the jurisdiction of the Interstate Commerce Commission to provide for the disposition of the said claims, as between The Railroad Credit Corporation and The Western Pacific Railroad Corporation, upon final consummation of the Plan. The Commission specifically declined to make any such provision. The position it took was confirmed by the judgment of the Supreme Court.

The District Court was in error, in taking jurisdiction of this question, under the Petition of the Reorganization Committee, filed May 9, 1944, and in dismissing the action brought independently by The Western Pacific Railroad Corporation, in a bill numbered 23307-S in said District Court.

5. The District Court erred in its interpretation of the Plan of Reorganization of the debtor company, as such interpretation appears in its Order of September 14, 1944 in that the Court assumes that the value of the new securities to be issued under said Plan is to be measured, not by the values fixed thereon by the Commission, but by the market values of such securities, and that such securities, when issued to the various creditors entitled thereto under the provisions of the

Plan, are not to be accepted by said creditors, including The Railroad Credit Corporation, in satisfaction of their claims, and at the values fixed by the Commission on said securities. The Plan provides no other basis of value, upon which such securities are to be issued or taken. The adoption of market values as distinguished from the values fixed by the Commission would destroy the fairness and validity of the allocation of such securities to all the classes of creditors entitled to receive them, as such allocation was made by the Plan, and affirmed by the Supreme Court."

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN MAKING ITS ORDER OF JUNE 19, 1944, AND IN ITS JUDGMENT FILED ON AUGUST 7, 1944, DISMISSING THE INDEPENDENT BILL OF COMPLAINT FILED BY THE WESTERN PACIFIC RAILROAD COMPANY AGAINST THE RAILROAD CREDIT CORPORATION.

(See Specified Errors 1 and 2; R. 10966, pp. 26-28.)

Upon the filing of appellant's bill against The Railroad Credit Corporation, the parties agreed to file, and did file with the District Court, on May 31, 1944, a stipulation that the matter might be heard on June 2, 1944, the date already set for the hearing of the Petition of the Reorganization Committee for construction by the District Court of the Plan of Reorganization. Simultaneously, The Railroad Credit Corporation filed an Alternative Motion to Dismiss or for Summary Judgment. (R. 10966, p. 10.) Argument on the Peti-

tion and on the Bill of Complaint were heard simultaneously by the Court, and the motion to dismiss granted by the Order of June 19, 1944.

It is the contention of appellant that the issues respecting the rights of the parties in the accommodation collateral were not properly within the jurisdiction of the District Court in the hearing in the bankruptcy matter. Section 77 of the Bankruptcy Act, as amended, grants to the District Court in which a Petition for a Plan of Reorganization is filed, "exclusive jurisdiction of the debtor and its property wherever located". (Bankruptcy Act, Section 77(a); 11 U.S.C. 205.) Nowhere in the statute is there any grant of jurisdiction to the Court to determine, within the scope of any hearing with respect to the reorganization, the rights, as between themselves alone, of creditors of the debtor railroad in and to property which is not and has at no time been the property of the debtor. Conflicting interests of creditors of the debtor in property of the debtor are, of course, determinable in the bankruptcy proceedings.

The Interstate Commerce Commission, in an early order approving a Plan of Reorganization, provided that the rights of the Reconstruction Finance Corporation and Railroad Credit Corporation "in collateral pledge with them by parties other than the debtor" should not be disturbed or altered. (230 I.C.C. 102; subdivision O of the Order of October 10, 1938.) Subsequently, in considering petitions filed for modification of this Order, the Commission declined to direct

that this collateral be "surrendered to the pledgors thereof". (233 I.C.C. 431, 432.)

And in its order promulgating the Plan of Reorganization finally approved by the District Court, and by the Supreme Court, the Commission included no provision comparable to subdivision O of its earlier order preserving the rights of The Reconstruction Finance Corporation and Railroad Credit Corporation in the collateral pledged with them by "parties other than the debtor". (236 I.C.C. 1.) The sole provision in the final order of the Commission, and therefore in the present Plan of Reorganization, as to the collateral securing the claims of The Reconstruction Finance Corporation and Railroad Credit Corporation is found in subdivision R of that final order:

> "All collateral *pledged by the debtor* as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company, shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and cancelled * * *" (233 I.C.C. 453.)

In brief, the Interstate Commerce Commission nowhere in the Plan of Reorganization determined, or attempted to determine, the rights of the pledgors and pledgees in accommodation collateral not the property of, and not pledged by the debtor.

"This collateral", says the opinion of the Supreme Court in affirming the approval by the District Court of the Plan of Reorganization, "other than the refunding bonds, was therefore left with the pledgees

with its position unaffected by any direct action of the Commission." (318 U. S. 506.) And later: "Of course the collateral loaned to the debtor which was not an obligation of the debtor, could not be ordered by the plan to be cancelled. It remained with the pledgees * * * The plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor." (318 U. S. 506.)

The disposition of the respective rights of The Western Pacific Railroad Corporation and The Railroad Credit Corporation was, therefore, not reached by the Plan. The Commission refused, and we think quite properly, to include it in the Plan. The Supreme Court approved the position taken by the Commission.

When the Reorganization Committee filed with the District Court its petition of May 9, 1944, for an Order of that Court, construing the Plan of Reorganization etc., it did so under the provision found in subdivision V of the Plan. Under the wording of that subdivision, the Court is charged only with the duty and vested only with the power, to construe, to cure defects, supply omissions, or reconcile inconsistencies *in the Plan* as may be necessary or expedient to carry out the Plan effectively. (233 I.C.C. 455.) (See R. 10962, p. 69.) In so doing the Court acts as an arbiter. It decides questions which affect the parties to the Plan of Reorganization, which this appellant was not. It cannot, within this subdivision, determine the rights of contending parties in property not affected by the Plan, and in which at no time the debtor in the reorganization proceeding had any interest.

The sole ground upon which the District Court made its order dismissing appellant's bill of complaint was, as stated therein, that the subject matter of that suit was closely connected with *and a part of* the reorganizaion proceeding, and that the issues contained in the bill were set forth in the Petition of the Reorganization Committee, and should be determined in that proceeding. In this we believe that the learned Court erred.

For the same reasons, we believe that the Court erred in its judgment filed August 7, 1944, dismissing the bill.

II.

THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE PLAN OF REORGANIZATION, IN ASSUMING THAT THE VALUE OF THE NEW SECURITIES TO BE ISSUED UNDER THE PLAN WAS TO BE MEASURED, NOT BY THE VALUES FIXED THEREON BY THE COMMISSION BUT BY THE MARKET VALUES OF SUCH SECURITIES, AND IN CONCLUDING THAT THE RAILROAD CREDIT CORPORATION UNDER THE PLAN WAS AUTHORIZED TO RECEIVE IN FULL SUCH SECURITIES AND NEVERTHELESS RETAIN AND PROCEED AGAINST THE ACCOMMODATION COLLATERAL PLEDGED AND OWNED BY APPELLANT.

(See Specified Errors 1-5; R. 10962, pp. 175-178.)

The basic facts regarding the pledge of the accommodation collateral are not in dispute.

The Railroad Credit Corporation was organized in December, 1931, pursuant to what is referred to in the record as the Marshalling and Distributing Plan, 1931. (R. 10962, pp. 5-26.) The railroad industry in

the period of the depression had appealed to the Interstate Commerce Commission for an increase in freight rates in a proceeding known as the Ffteen Per Cent. Case 1931, Ex parte 103. The Commission granted partial relief but only upon condition that the stronger carriers pay over all earnings derived from the increased rates into a pool from which loans might be made to weaker carriers threatened with receivership or bankruptcy. The Railroad Credit Corporation was set up to carry out this arrangement. Loans were made to weaker carriers, sometimes with and sometimes without adequate collateral but it became customary for The Railroad Credit Corporation to require each borrower to pledge as part security for the repayment of the loan its distributive share of the moneys repaid by the more fortunate borrower. Large sums were paid into the pool by the participants and a very large part was ultimately repaid as the result of successful liquidation of most of the loans made by The Railroad Credit Corporation. Among the good loans made by The Railroad Credit Corporation were two loans made to The Western Pacific Railroad Company, one in the amount of $1,303,000, dated June 29, 1932, the other in the amount of $1,293,439, dated March 25, 1933. (R. 10962, pp. 44-59.) The collateral for these notes is shown in the note dated March 25, 1933. (R. 10962, pp. 53-54.) Endorsed on these notes are credits applied thereon which represents amounts received by The Western Pacific Railroad Company and its subsidiaries under the Marshalling and Distributing Plan. As of January 1, 1939 the amounts

due upon these notes were $2,455,610 together with $146,503 of interest accrued and unpaid to January 1, 1939. (R. 10962, p. 72.)

The collateral security for these notes consisted of the following items:

(a) *Debtor Collateral*

Refunding Mortage Bonds of the Debtor, Series A, pledged by the Debtor	$2,000,000
Refunding Mortgage Bonds of the Debtor, Series B, pledged by the Debtor	2,000,000
Assignment of moneys due the Debtor and subsidiary under the Marshalling and Distributing Plan made and executed by the Debtor.	
Assignment of equity in collateral pledged with Reconstruction Finance Corporation.	

(b) *Accommodation Collateral*

Advances from The Western Pacific Railroad Corporation to the Debtor pledged by The Western Pacific Railroad Corporation	$5,494,722
Advances from The Western Pacific Railroad Corporation to the Standard Realty and Development Company pledged by The Western Pacific Railroad Corporation	120,000
Advances from The Western Pacific Railroad Corporation to the	

Sacramento Northern Railway pledged by the Western Pacific Railroad Corporation	856,200
(This subject to possible claim by Trustees of Railroad Company or its First Mortgage.)	

(See footnote to Opinion of Judge St. Sure in *In re Western Pacific Railroad Company,* 34 Fed. Supp. 493.)

On August 2, 1936, The Western Pacific Railroad Company filed its Petition in the District Court and in the Interstate Commerce Commission for reorganization under Section 77. This Court is familiar with the subsequent proceedings which resulted in the reorganization effective as of January 1, 1939. The history of the proceeding is disclosed by the Reports of the Interstate Commerce Commission, 230 I.C.C. 61; 233 I.C.C. 409; 236 I.C.C. 1; the Opinion of the District Court, 34 Fed. Supp. 493; the Opinion of this Court, 124 Fed. (2d) 136; and the Opinion of the United States Supreme Court, 318 U. S. 448.

We are here concerned with what was done by the Plan of Reorganization in making whole the holders of First Mortgage Bonds of the Debtor and The Railroad Credit Corporation as a secured creditor.

The First Mortgage Bonds were outstanding as of January 1, 1939, the effective date of the Plan, in the principal amount of $49,290,100. Interest accrued and unpaid as of that date amounted to $13,143,776.66. These Bonds were dated March 1, 1916, bore interest

at 5% and mature March 1, 1946 (233 I.C.C. 409; 34 Fed. Supp. 493.) The First Mortgage Bonds were secured by a First Mortgage on all of the Debtor's properties valued for purposes of reorganization at $97,863,522 except that moneys and securities amounting or valued by the Commission at $1,879,965 were deposited and pledged under and were subject to the paramount lien of the Debtor's Refunding Mortgage. (R. 10966, pp. 5-6.) *Ecker v. Western Pacific Railroad Corporation,* 318 U. S. 448. Under the terms of the Plan of Reorganization the holders of these First Mortgage Bonds were alloted $19,716,040 of new Income Mortgage 4½% Bonds, $29,574,060 of new 5% Preferred Stock and 230,593 shares of Common Stock taken at $57 per share. The District Court breaks this down into percentages as follows:

> "The first mortgage bonds are allotted new income mortgage bonds for 40% of the principal of their claim, new preferred stock for 60% of the principal of their claim and new common stock for 100% of their accrued interest, such common stock having been allotted at the price of $57 per share." (R. 10962, p. 70; *In re Western Pacific Railroad Company,* 34 Fed. Supp. 493.)

It is to be noted and emphasized at this point that the First Mortgage Bondholders received 230,187 shares of Common Stock out of an issue of 319,440 shares, leaving an authorized balance of 89,253 shares for creditors holding notes or obligations secured by the junior Refunding Mortgage. These shares at a value of $62 per share represent $5,534,186 of surplus

taken from the senior lienor and passed down to the junior lienor. (R. 10962, p. 72.)

The Railroad Credit Corporation total claim as of January 1, 1939, was $2,455,616 together with $146,563 of interest accrued and unpaid to that date. Under the terms of the Plan The Railroad Credit Corporation was allotted $154,111 of Income Mortgage 4½% Series A Bonds, $241,681 of 5% Preferred Stock, Series A, its proportionate share based on its proportion of Refunding Bonds of $1,879,965 of cash and securities pledged under the Refunding Mortgage and 35,425 shares of Common Stock taken at the price of $62, being part of the 89,253 shares not required to make whole the holders of the First Mortgage Bonds) (R. 10962, p. 72.)

In allotting these 89,253 shares representing $5,534,186 of the First Mortgage trust estate which was not required in order to make whole and give full compensatory treatment to the holders of First Mortgage Bonds, the Interstate Commerce Commission made a division of these shares between the two junior creditors in the proportion that the pledged Refunding Bonds held by such creditor bore to the total amount of Refunding Bonds. This was explained by the Court as follows:

> "RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC and ACJ bonds, are deducted that proportion of each class which the

principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. The result is the allotment of common stock to RCC on its claim at the price of $62 per share." (R. 10962, p. 74.)

The fact that the figure $62 was actually reached by the process above described seemed to have obscured the true issue in the mind of the learned Court. The true issue was not how the figure $62 had been arrived at by the Commission but whether on the record as an entirety the figure was not equal to the true value of the stock. We think this true value is to be determined as follows:

Aside from $2,750,050 of equipment obligations left undisturbed by the Plan, and $10,000,000 Trustees Certificates held by Reconstruction Finance Corporation replaced under the Plan by $10,000,000 New First Mortgage 4% Bonds, Series A, allotted to RFC, the secured creditors whose claims were found of value by the Interstate Commerce Commision were:

First Mortgage Bondholders	$62,433,876.00
Reconstruction Finance Corporation	3,862,869.00
The Railroad Credit Corporation	2,590,924.11
A. C. James Company	6,249,750.00

(318 U. S. 455.)

To meet these claims the Commission in the Plan authorized and allocated the issue of new securities to these four secured creditors as follows:

(1) *First Mortgage Bondholders:*

Income 4½% Bonds	Face Value	$19,716,040
5% Preferred Stock	" "	29,574,060
Common Stock (no par)		
230,593 shares @ $57		13,143,801
Total		$62,433,901

The value placed by the Commission on these new securities exceeded the claim of the bondholders by $14.34.

(2) *RFC:*

Income 4½% Bonds	Face Value	$1,185,200
5% Preferred Stock	" "	1,777,800
Common Stock (no par)		
15,788 shares @ $57		899,916
Total		$3,862,916

The value placed by the Commission on these new securities exceeded the claim of RFC by $46.02.

(3) *Railroad Credit Corporation:*

Income 4½% Bonds	Face Value	$ 154,111
5% Preferred Stock	" "	241,681
Common Stock (no par)		
35,425 shares @ $62		2,196,350
Total		$2,592,142

The value placed by the Commission on these new securities *exceeded the claim* of RCC by $1,117.89.

(4) *A. C. James Co.:*

Income 4½% Bonds	Face Value	$ 163,724
5% Preferred Stock	" "	256,756
Common Stock (no par)		
37,635 shares @ $62		2,333,370
Total		$2,753,850

The value placed by the Commission on these new securities is $3,495,900 less than the A. C. James claim.

It is the contention of appellant that for the purpose of meeting and satisfying the claims of these creditors, the new securities must be taken and accepted by them *at the rates* and in the amounts fixed by the Commission. That is why, in subdivision R of the Plan, the Commission provided that:

> "To the extent to which received prior to the issuance of new securities under the Plan, these payments under the Marshalling and Distributing Plan shall be applied in reduction of the Claim of the Railroad Credit Corporation *in respect of which* such new securities are to be issued *at the rates* provided in subdivision P."

These payments were pledged directly by the debtor. The Commission's order required, and the District Court approved the construction, that when applied in reducing the amount of new securities offered in satisfaction of the RCC claim, it should be at the rate, $62 per share, fixed by the Commission for the common stock.

It surely cannot be, that the same securities can be taken at one price where the rights of the debtor furnishing collateral are involved, and at another price where the rights of a third party, furnishing accommodation collateral, are involved.

The Commission was required by the law of the land to give full value to the property of the debtor in formulating a plan of reorganization. It was required to allocate new securities at prices which would reflect truly such value. In the opinion of the Supreme Court, that is precisely what it did. 318 U. S. 481.

If The Railroad Credit Corporation was not made whole and its claim satisfied by the new securities it was entitled to receive under the Plan, at the values fixed thereon by the Commission, then assuredly the claims of the First Mortgage Bondholders, first in priority, were not satisfied under the rules and according to the cases repeatedly cited by the opinion of the Supreme Court. If fluctuating market values may, as The Railroad Credit Corporation contends, be substituted for the values fixed by the Commission the entire Plan would be rendered unfair, unsound and invalid.

The secured notes held by The Railroad Credit Corporation were classified by the Court as constituting a separate class and were designated as class 5. By the terms of Section 77 The Railroad Credit Corporation then had power acting alone to reject the Plan and prevent it from being carried out unless after hearing the Court could make the special findings specified in

subsection (e) and set out below.* Late in 1943 the Plan was submitted for acceptance or rejection by secured creditors and was accepted by them "including the defendant Railroad Credit Corporation which took such action without asking the approval and consent of the Plaintiff as owner of the accommodation collateral hereinabove specified". (R. 10966, pp. 4-5.)

III.

THE APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, IS ENTITLED TO THE RELIEF PRAYED IN ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION FOR THE REASON THAT IT HAS BEEN MADE WHOLE AND ITS CLAIM IS SATISFIED.

The first major premise of the appellant, The Western Pacific Railroad Corporation, is that The Railroad Credit Corporation has been made whole by resort to certain of the collateral pledged by The Western Pacific Railroad Company, the Debtor in the bankruptcy proceeding, and in consequence (a) the

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*The pertinent provision is that the District Court may confirm a Plan of Reorganization which has not been accepted by the requisite percentages of the various classes of creditors to whom it has been submitted *only* "if he is satisfied and finds, *after hearing*—

i that it makes adequate provision for fair and equitable treatment for the interests and claims of those rejecting it;

ii that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and

iii that the plan conforms to the requirements of clause (1) to (3) inclusive of the first paragraph of this subsection (e)." (The italics and numbers *i*, *ii* and *iii* are not in the text and are inserted for emphasis and clarification.)

Debtor is entitled to the excess collateral to which The Railroad Credit Corporation has no further claim, and (b) the appellant, The Western Pacific Railroad Corporation, has been exonerated from all liability in the premises and its accommodation collateral must be restored together with cash thereon received after January 1, 1939, the effective date of the Plan of Reorganization.

We shall subdivide the foregoing major premise into its component parts and discuss each subproposition separately.

(A) The Railroad Credit Corporation has been made whole.

The allotments of new securities under the Plan of Reorganization are shown in Article VIII and IX of the Bill of Complaint of the appellant, The Western Pacific Railroad Corporation. (R. 10966, pp. 6-7.) These same figures appear in the Petition of the Reorganization Committee under Articles II and III. (R. 10962, pp. 72-84.) All securities of the Reorganized Company were allotted in reorganization to two groups of creditors—first: to holders of Bonds secured by the Debtor's First Mortgage; and second: to holders of Notes primarily secured by various items of collateral furnished by the principal Debtor including Bonds in varying proportions issued under the Debtor's Refunding Mortgage and secondarily secured by accommodation collateral furnished by the appellant, The Western Pacific Railroad Corporation.

Except for certain cash and securities of relative unimportance deposited under the Refunding Mort-

gage, the lien of the refunding Mortgage is *wholly* subordinate to the First Mortgage. (R. 10966, pp. 5-6.)

Accordingly under the rule of strict priority asserted and reasserted by the Supreme Court of the United States in *Boyd v. Northern Pacific Railroad Company,* 228 U. S. 482, *Consolidated Rock Products Company v. DuBois,* 312 U. S. 510 and *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 318 U. S. 523, the holders of the First Mortgage Bonds must be made whole before any part of their exclusive trust estate may lawfully be taken from them and passed down to creditors secured by Bonds issued under the Debtor's subordinate Refunding Mortgage.

In making the holders of First Mortgage Bonds whole, the Plan allotted to each holder of First Mortgage Bonds—40% of the principal of their claim in new 4½% Income Bonds and 60% in 5% Preferred Stock and Common Stock for 100% of their accrued interest; such stock being allotted at the specified price of $57 per share.

Since, under the decision of the Supreme Court in *Consolidated Rock Products Company v. DuBois,* supra, and many other cases, there is no legal distinction between principal and interest, each being equally and ratably secured by the First Mortgage, it is clear that the holders of First Mortgage Bonds are made whole by what was given them in new securities including Common Stock taken at the price

of $57 per share for each $100 of debt regardless of whether the debt be principal or accrued interest.

It must *not* be inferred, however, that the First Mortgage Bondholders are made whole when given the equivalent of 100% of the principal and interest upon their Bonds.

The Supreme Court repudiated that idea in its decision in *Consolidated Rock Products Company v. DuBois,* supra, where Mr. Justice Douglas said:

> "True, the relative priorities are maintained. But the bondholders have not been made whole. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. Those lost rights are of value. *Full compensatory provision must be made for the entire bundle of rights which the creditors surrender.*" (Our italics.)

This doctrine was reasserted with renewed vigor in the opinion written for the Supreme Court by the same Justice in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (318 U. S. 523, 569-570).

It is clear therefore that the First Mortgage Bondholders were entitled to receive the equivalent of 100% of the principal and interest represented by their First Mortgage Bonds and *in addition* were entitled to receive compensation (a) for surrendering

their first lien status and fixed interest bearing 5% Bonds not due until March 1, 1946, and (b) for surrendering their contract for interest at 5% between the effective date of the Plan, January 1, 1939, and the maturity of the Bonds in March, 1946. If the new Common Stock had been given to The Railroad Credit Corporation at the same rate or value assigned to it by the Interstate Commerce Commission in making whole the holders of the First Mortgage Bonds then The Railroad Credit Corporation would have been unduly enriched at least to the extent of $5 per share on each share of the Common Stock received under the Plan.

Under the decision of the Supreme Court of the United States in this proceeding, we submit that it is *res adjudicata* (a) that the First Mortgage Bonds have been made whole by the allotment of new securities including Common Stock taken at $57 per share; and (b) that they have received adequate compensation for the entire bundle of their rights which they surrendered under the Plan and that the only compensation that can be spelled out for the surrender of their senior rights was the allotment of the Common Stock at $5 per share below its actual value; otherwise it would have been necessary for the Supreme Court to reverse the case as it did at the same time reverse the companion case of *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* supra. At the risk of repetition we again ask this Court to note that that case was reversed by the Supreme Court and remanded to the

Commission to "determine what the General Mortgage Bonds should receive *in addition* (our italics) to the face amount of inferior securities equal to the face amount of their old ones as equitable compensation, qualitive for quantitive, for the loss of their senior rights". (Per Mr. Justice Douglas, at p. 571.)

The additional compensation which it was necessary to give to the First Mortgage Bondholders but to which the junior creditors were not entitled explains the $5 differential in the price of the same Common Stock allotted to The Railroad Credit Corporation. Nor do we understand that The Railroad Credit Corporation questions this. Their basic argument is that while the First Mortgage Bondholders are made whole in law by the allotment to them of Common Stock at $57 per share, they are not made whole in fact, because the new Common Stock does not or did not sell at $57 per share. They do not urge that the differential of $5 is not a fair allowance to the First Mortgage Bondholders for the sacrifice of their senior position.

(B) The Interstate Commerce Commission recognized that The Railroad Credit Corporation had been made whole.

As we have already pointed out one of the direct consequences of making The Railroad Credit Corporation whole was the release and discharge of the excess collateral which had been pledged by the Debtor. (*Peter A. Frasse & Co. v. Hartford Automotive Parts Co.,* 300 Fed. 876.) This was recognized by the Interstate Commerce Commission, which expressly provided that all moneys received under the Marshalling

and Distributing Plan between January 1, 1931 and the effective date of the Plan (an assignment of which was part of the collateral pledged by the Debtor) should be credited to the Debtor, and the new securities issuable to The Railroad Credit Corporation should be ratably reduced. Thus it is alleged in the separate Bill of Complaint "that inasmuch as the defendant, The Railroad Credit Corporation, had been made whole by the allocation of the above securities (a) without resorting to pledged interest of the Railroad Company or its subsidiaries under the Marshalling and Distributing Plan paid subsequent to the effective date of the Plan and prior to the issue of the new securities or (b) without resorting at all to the accommodation collateral, *provision was made in the Plan* that the amount of the claim of the defendant, The Railroad Credit Corporation, should be *reduced* by the amounts received under the Marshalling and Distributing Plan between those dates". It is true that The Railroad Credit Corporation has complained of this provision of the Plan (but not until it had voted for the Plan and all essential steps had been taken for the issue and delivery of the new securities) and its complaint has been submitted to the District Court for determination under Article V of the Plan and has been determined adversely to it. This determination, unless Article V does not mean what it says, is final and conclusive. We think that in making such a determination the Court acts as an arbitrator and not as a judge and his determination being non-judicial is non-appealable. Nor should it be appealable. At the stage of the reor-

ganization proceeding which is reached when a provision such as Article V is invoked the delay occasioned by an appeal would in nine cases out of ten be fatal to the Plan. But we think it quite clear, as the Reorganization Committee are prepared to show, that the Court's determination was correct and unless the appeal of The Railroad Credit Corporation is dismissed the Court's determination should be affirmed.

(C) The Railroad Credit Corporation is estopped to deny that it has been made whole.

In reaching the conclusion that The Railroad Credit Corporation has been made whole under the Plan, we are fortified by the circumstance that The Railroad Credit Corporation, based upon what it has done rather than what it has said and is saying, has itself recognized and is estopped now to deny that it has been made whole. If The Railroad Credit Corporation itself had not recognized that it was being made whole in law and in fact under the Plan by resort to collateral supplied by the Debtor, it was manifestly its duty to communicate its doubt on that vital point to the owner of the accommodation collateral and secure its instructions as to whether to vote for or against the Plan of Reorganization. The consequence of its disregard of the rights of the owner of the collateral are two-fold: (i) it is estopped to deny that it has been made whole and its claim discharged and (ii) it released the surety regardless of whether it was or was not made whole. The release of the surety will be discussed separately at a subsequent point.

(D) The accommodation collateral has been exonerated from all liability and should be restored together with all cash thereon received by The Railroad Credit Corporation.

By the same rule which requires the excess collateral pledged by the Debtor to be released from the pledge when the creditor has been made whole, the accommodation collateral against which recourse may be had only in the event that the Debtor's own collateral is exhausted must likewise be released. This is a rudimentary principle of the law of suretyship to which all will agree without elaboration or further elucidation and without citation of authority. The following may, however, be consulted:

49 *Corpus Juris,* 982, 986;
Commercial National Bank v. National Surety Company, 259 N. Y. 151;
Matter of Cooke, 147 Misc. 528;
Robinson v. Roe, 233 Fed. 936;
Peter A. Frasse & Co. v. Hartford Automotive Parts Co., 300 Fed. 876.

Why the learned District Court thought this principle inapplicable here has not been made clear. The District Court seems to have said in substance: The holders of the Debtor's First Mortgage Bonds have been made whole and have received full compensatory treatment by resort to and use of only a *part* of the very ample trust estate that was pledged as security for the payment of their debt; and so the Court has taken what remained—an item of $5,534,186—and given it to the junior secured creditors; the District Court has made this distribution of senior security to the junior creditors by allotting to them the same

Common Stock that was given to the First Mortgage Bonds at $57 per share. The allotment of the new Common Stock to the better secured of the two junior secured creditors was made at the same basic price after allowing $5 per share additional as compensation for their surrendered seniority which the junior creditors did not enjoy; but the making whole of the First Mortgage Bondholders was a mere legal fiction which may not be extended to a junior creditor so as to prevent the junior creditor from enriching himself further at the expense of an accommodation surety who, strange as it may seem, has always been favored in a court of equity.

We submit with all possible respect to the learned District Court that there is something fundamentally wrong in a system of jurisprudence which permit itself to be tied in knots and strangled by fiction of that character.

IV.

THE APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, IS ENTITLED TO THE RELIEF PRAYED IN ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION FOR THE REASON THAT ITS ACCEPTANCE OF THE PLAN OF REORGANIZATION WITHOUT THE CONSENT OF THE WESTERN PACIFIC RAILROAD CORPORATION RESULTED IN A FUNDAMENTAL CHANGE IN THE COLLATERAL PLEDGED BY THE PRINCIPAL DEBTOR.

It is a fundamental principle of the law of suretyship that the surety (in which category an accommodation endorser or the depositor of accommodation

collateral indubitably belongs) is entitled to have the engagement of the principal Debtor preserved without variation or alteration of its terms or status and that the consent of the surety to any such change is essential if his obligation likewise is to be preserved. (Negotiable Instrument Law of New York, Article X, Sec. 201; *The National Park Bank of New York v. Kohler,* 204 N. Y. 174; *Wright v. North River Ins. Co.,* 23 Fed. (2d) 548.)

The Railroad Credit Corporation violated this elementary principle when without consultation with or the consent of The Western Pacific Railroad Corporation it voted to accept the Plan of Reorganization.

The Plan of Reorganization which resulted in a fundamental change in the collateral pledged with The Railroad Credit Corporation by the principal Debtor was not submitted to creditors for acceptance or rejection until the fall of 1943, and under the terms of Section 77 it could not be carried out by the Court against an adverse vote by The Railroad Credit Corporation unless the Court granted a new hearing, which would have permitted the introduction of evidence of the vast economic changes that had occurred after September 19, 1939, when the Commission made the findings upon which the Plan was based. At a hearing on confirmation after an adverse vote by The Railroad Credit Corporation, it could easily have been shown that by reason of the changes in the money market and the rates for the hire of money secured by senior railroad liens the First Mortgage Bondholders could have been made whole by the allotment of new

securities bearing interest rates as low as 3% instead of 4½% and 5% as provided in the Plan and for that reason alone even under the low capitalization permitted by the Interstate Commerce Commission it would have been possible to pay off in cash all of the junior creditors. Under these circumstances it would be grossly inequitable to permit The Railroad Credit Corporation to claim that it has not been made whole and to secure recoupment for a theoretical loss through seizure and appropriation of the accommodation collateral.

V.

THE RIGHT OF APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, TO FULL RELIEF UNDER ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION IS NOT DEFEATED BY THE ACTION OF THE DISTRICT COURT IN PROCEEDING 26591-S.

As already stated the appellant, The Western Pacific Railroad Corporation, desires a decision on the merits but respectfully submits that the District Court was without authority or jurisdiction to determine the question in the proceeding 26591-S which is under Section 77 of the National Bankruptcy Act.

We fail to understand how either the Reorganization Committee or the learned District Court assumed that the subject was cognizable under Article V of the Plan of Reorganization in view of the express provision of subsection (a) of Section 77 which limits the jurisdiction of the District Court "to the Debtor and its property" and excludes the Court from juris-

diction over property other than that of the Debtor and (b) the express determination by the Supreme Court of the United States in this very proceeding that "the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor" and that the collateral, other than refunding bonds, was therefore "left with the pledgees with its position unaffected by any direct action of the Commission".

Of course, if these rights were not dealt with in the Plan, the District Court is powerless to adjudicate them under special authority given him by Article V to construe the Plan. This point is one of substance. Orders of Court under Article V are "final and conclusive" and hence not appealable. The parties to the Plan have agreed to this stipulation in Article V which is the equivalent of a valid agreement not to appeal from any determination of the Court made under that Article of the Plan. But The Western Pacific Railroad Corporation is not a party to the Plan and cannot lawfully be required to submit to an arbitration made under its provisions. We therefore think that the order of the Court in No. 26591-S should be reversed, as relating to a subject not embraced in that Article, and the full relief as prayed should be granted the plaintiff under the independent Bill of Complaint.

But assuming for argument that the Court might determine this controversy under Article V, we think it equally clear that the conclusion which the Court reached was erroneous.

That the learned District Court totally misconceived the case seems to us to be shown by the following statement in the Court's amended Opinion which we have broken down into four parts for convenience of analysis:

(i) "The Western Pacific Railroad Corporation is attempting to do what the Supreme Court said could not be done by the plan."

(ii) "If the Railroad Credit Corporation were in the position of the A. C. James Co. and would receive securities of the face value of less than half the amount of its claim, it could not be contended that the acceptance of the most that could be allotted to it from the assets of the debtor under the plan would release any outside collateral which it might hold."

(iii) "It follows that if the market value of the securities is much less than their face value, as contended by the Railroad Credit Corporation, and it will not be able to realize thereon enough to satisfy its claim, it is not made whole nevertheless by the allotment to it of securities of a face value approximating the amount of its claim, as contended by the Western Pacific Railroad Corporation."

(iv) "As a junior claimant it has consented to accept from the debtor's estate as much as it has been found entitled to. There is no presumption that it has been made whole. It is fortunate enough to have outside collateral against which it can proceed if the estate of the debtor cannot satisfy the claim."

(i) **The Western Pacific Railroad Corporation is attempting to do what the Supreme Court said could not be done by the Plan.**

We think this clearly to be a misconception. The appellant is attempting to do by independent suit what the Supreme Court said was not done by the Plan and could not be done by the Bankruptcy Court. But in the independent suit the determination by the Interstate Commerce Commission, affirmed by the District Court, that The Railroad Credit Corporation was made whole without even resorting to all of the collateral pledged by the principal debtor is a conclusive determination that the accommodation collateral has been discharged.

(ii) **If The Railroad Credit Corporation were in the position of the A. C. James Co. and would receive securities of the face value of less than half the amount of its claim, it could not be contended that the acceptance of the most that could be allotted to it from the assets of the debtor under the plan would release any outside collateral which it might hold.**

We quite agree that the A. C. James Co., *unlike The Railroad Credit Corporation,* has not been made whole by resort to the collateral pledged by the principal debtor, and in its case, if there had been a pledge of accommodation collateral, it might have had recourse against such collateral. It does not logically follow that The Railroad Credit Corporation, not being obliged to exhaust the collateral furnished by the principal debtor, may nevertheless resort to accommodation collateral.

(iii) It follows that if the market value of the securities is much less than their face value, as contended by The Railroad Credit Corporation, and it will not be able to realize thereon enough to satisfy its claim, it is not made whole nevertheless by the allotment to it of securities of a face value approximating the amount of its claim, as contended by The Western Pacific Railroad Corporation.

There is here an obvious factual misunderstanding on the part of the District Court. The Railroad Credit Corporation was made whole by an allotment of certain securities, including Common Stock which had no face value at all. But the Interstate Commerce Commission determined, and the District Court affirmed the determination, that the First Mortgage Bonds *would* be made whole, plus full compensation for their surrender of seniority by an allotment of Common Stock without par value taken at a value of $57 per share, and that the Railroad Credit Corporation, possessing no senior rights, would be made whole by an allotment of the same stock at $62 per share and without resorting to all of the collateral pledged by the principal debtor.

(iv) As a junior claimant it has consented to accept from the debtor's estate as much as it has been found entitled to. There is no presumption that it has been made whole. It is fortunate enough to have outside collateral against which it can proceed if the estate of the debtor cannot satisfy the claim.

We agree that there is no presumption that The Railroad Credit Corporation has been made whole, and we rely on no such presumption. Our reliance is upon the facts of record as hereinbefore recited, which conclusively prove that The Railroad Credit

Corporation has been made whole as a matter of law, and that for this reason and for other reasons stated above, the pledged accommodation collateral has been discharged from any and all liability and should be restored to its rightful owner, together with cash received thereon by The Railroad Credit Corporation subsequent to January 1, 1939.

All of which is respectfully submitted.

Dated, Oakland, California,
April 16, 1945.

THE WESTERN PACIFIC RAILROAD CORPORATION,
By LEROY R. GOODRICH,
Its Attorney.

F. C. NICODEMUS, JR.,
Of Counsel.